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Dec 08 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Bentley D. Price, Circuit Court Judge

APPELLATE CASE NO. 2022-000469
Case No. 2019-CP-07-02629

Margaret A. Eberly and Barbara J. Pavelik,
Plaintiffs

v.

Advanced Flooring & Design Division of ISI, LLC; Archer Exteriors, Inc.; Crossroads Enterprises, LLC; D.R. Horton, Inc.; East Coast Construction Cleanup Corp.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; and Valim Construction, LLC,

Defendants of which D. R. Horton, Inc. is Appellant,

And

D. R. Horton, Inc.,

Cross-claimant and Appellant,

v.

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.,
Cross-defendants and Respondents

PETITION FOR WRIT OF CERTIORARI

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INDEX

Questions Presented 3
Statement of the Case 3
Argument6
Conclusion9
Certificate of Counsel11
Exhibit A14

QUESTIONS PRESENTED

1. May a lawyer correct a scrivener’s error in his Notice of Appeal that misidentifies the respondents but correctly identifies the orders under appeal?
2. Can a lawyer rely on an official communication from the Court of Common Pleas through the SC Courts E-Filing System, sent to all registered counsel in a case, that it has served a Notice of Appeal on all of them?
3. May a Notice of Appeal be served through the SC Courts E-Filing System?

STATEMENT OF THE CASE

There are two reasons that the Supreme Court should grant certiorari. The first is that the Court of Appeals overrode longstanding South Carolina Supreme Court precedent when it refused to allow appellant’s counsel to correct a scrivener’s error in the caption of the Notice of Appeal. The error was misidentifying the respondents. The orders appealed from were correctly described and they were the only orders in the case. No one was misled by the error. Since at least 1899, the South Carolina Supreme Court has allowed such errors to be corrected.

The second reason that the Supreme Court should grant certiorari is that the bar deserves and needs guidance on the scope of service by the SC Courts E-Filing System. The SC Courts E-

Filing System is both new and complex, even daunting to lawyers raised in a world that relied solely on paper and manual delivery. These challenges are magnified when the matter involves service at the bridge between the Court of Common Pleas and the Court of Appeals. Disruptions and changes to judicial proceedings, including service and filing, brought about by the pandemic have made these problems even more confusing and worse.

This issue is novel. It has not been decided by the South Carolina Supreme Court.

Its resolution stymied the Court of Appeals, which did not address the important point that a lawyer should—indeed must—be able to rely on an official communication from the Court of Common Pleas through the SC Courts E-Filing System.

At minimum, the Court of Appeals decision, because it relates to a complex novel issue that is without precedent and involves a wholesale change in procedure - namely electronic filing disrupted by a pandemic - should be applied only prospectively, and not in this case. Equally significant, this case gives the Supreme Court the opportunity to clarify the scope of electronic filing, which is of importance far beyond the parties now before it.

On appeal, this case never reached the briefing stage. It was dismissed because the Court of Appeals refused to acknowledge the validity of service by the Court of Common Pleas through the SC Courts E-Filing System. Service of the Notice of Appeal was accomplished by that system within the 30-day requirement of Rule 203(b)(1) SCACR. That is clear from the record generated and sent to all counsel by the SC Courts E-Filing System and the Court of Common Pleas. Exhibit A. There is no dispute about the record. Even so, the Court of Appeals dismissed the appeal.

The underlying case was initiated by the purchasers of a new home who were dissatisfied with its construction. Suit was filed against the appellant developer and various contractors. The developer crossclaimed against the respondent contractors on contractual indemnities and duties to defend. Those respondents moved for summary judgment on the crossclaims and on March 11,

2022 the judge granted those motions for two of the respondents. The appeal does not involve the homeowners as respondents. It should not involve the respondent whose motion was not granted. That respondent is Lather Construction SC, Inc. Out of an abundance of caution, it was included when the respondents' identities were corrected. The appellant timely moved to alter or amend on March 18, 2022. The respondent Lather Construction SC, Inc. did not move so move. The judge denied the appellant's motion on March 24, 2022. Lather Construction SC, Inc., should now be dismissed as a respondent.

On April 11, 2022, 18 days after the circuit court issued its March 24, 2022 order on appellant's motion to alter or amend, appellant's counsel Jason Imhoff filed and served a Notice of Appeal correctly identifying the orders on appeal. It was filed within the 30-day required window. All counsel were served by the Court of Common Pleas through the SC Courts E-Filing System. The Court informed all counsel that they had been served electronically and that no one needed to be served by mail or hand delivery. All counsel were fully informed of the proceedings. No one was misled or prejudiced.

On April 28, 2022, after discovering his scrivener's error concerning the identities of the respondents Mr. Imhoff then filed an Amended Notice of Appeal, which corrected the error. It was served electronically, as before, and also by U. S. Mail.

ARGUMENT

“Civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 602, S.E.2d 772 (2004). That is precisely what has happened in this case.

Appellant’s Notice of Appeal was timely served utilizing the South Carolina Electronic Filing Policies and Guidelines (SCEF) promulgated by the South Carolina Supreme Court. Rule 4(e)(2), SCEF, provides “the E-Filing of that pleading, motion or other paper . . . constitutes proper service under Rule 5, SCRCF . . .” Rule 4(e)(3), SCEF, states “Service of a pleading, motion or other paper . . . is complete at the time of the submission of the pleading, motion, or other paper for E-Filing) . . .” The Supreme Court Order in Appellate Case No. 2022-000029, Order No. 2022-05-06-04, dated May 6, 2022, states, “(e) Requirement for Service. In all cases: . . . (4) . . . “Lawyers are reminded that **the E-Filing System automatically serves parties that have appeared in a case, and the Notice of Electronic Filing (NEF) indicates which parties have been served.**” (Emphasis supplied). That Order also states in footnote 1, “The Supreme Court similarly permits service by electronic means in matters governed by the SCACR in accordance with 262(c)(3), SCACR, which states that, in addition to service by delivery or via U.S. mail, a party may also serve a copy by electronic means in a manner specified by order of the Supreme Court.” Timely service of a notice of appeal is covered by both the South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules. E.g., Rule 6(b) SCRCF and Rule 203 SCACR. Appellant’s Notice of Appeal was timely and properly served under the rules.

The official court record states, “The following people were served electronically.” It lists the Respondents. Exhibit A. They were served within the required thirty-day period. Exhibit A also states, “The following people . . . must be served by traditional means.” No one is listed to be served that way. The Respondents were properly served.

The Supreme Court has noted that confusion has arisen regarding the electronic service rules. *See Wells Fargo v. Fallon*, Opinion 277773, Feb. 28, 2018 (S.C. Supreme Court acknowledged the confusion that has arisen by electronic communications in the litigation sphere). Accordingly, the Supreme Court has stated that fairness dictates that clarification concerning Rule 203, SCACR, for notices of appeal should be applied only prospectively. *See Id.* Fairness should apply in this case, as well.

In the original notice of appeal, the proper respondents were misidentified. This was a scrivener's error. The order under appeal was properly identified, however, and for that reason there could be no mistake about the respondents. Since at least 1899 the Supreme Court has allowed scrivener's errors in notices of appeal to be corrected, including a mistake in the case caption wherein respondents are incorrectly listed. *See Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899) (error in title/no prejudice found); *Charlestown Lumber Co. Inc. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431 (Ct. App. 1995) (failure to identify order appealed from/no prejudice found; also, "Clerical errors in a notice of appeal do not destroy the appeal") (citing *Moody, supra*) ("the court may properly allow an appellant to correct a mere clerical error in the title to his notice of intention to appeal where there is no prejudice to appellee"). In *Charleston Lumber* the court stated, "Clerical errors in a notice of appeal do not destroy the appeal . . . We find this error was clerical in nature, and does not warrant dismissal of the appeal. Charleston Lumber does not allege any prejudice as a result of the omission and there can be no doubt that Charleston Lumber had notice that the Millers had appealed all cases. Charleston Lumber's effort to take advantage of a mere clerical error by which they were in no way prejudiced or misled is rejected." 318 S. C. at 478. There was no prejudice in this case, no prejudice was asserted, and none could be asserted in good faith because the scrivener's error concerning the respondents was corrected as soon as it was discovered.

The Order dismissing the appeal is one paragraph long. It cites Rule 262, SCACR, as the basis for dismissal but does not explain why that rule requires dismissal. It does not explain why the official court record in this case--noting sufficient service--is not valid. It does not explain why Rule 4, SCEF--which validates service in this case--does not apply. It offers no explanation as to why it is not following the law stated by the Supreme Court allowing correction of scrivener's errors. *See Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899); *Charlestown Lumber Co. Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). It does not dispute that confusion exists in the application of the electronic service rules, and does not explain why it does not in fairness follow the South Carolina Supreme Court's decision in *Wells Fargo v. Fallon*, *supra*, and apply its ruling on electronic service only prospectively.

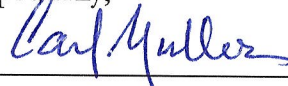
Lather Construction SC, Inc. is not a proper party to the appeal because the circuit court did not grant its motion for summary judgment. Regarding Lather Construction SC, Inc. there is no order to appeal. Appellants request that the Court acknowledge this so there is no confusion on that issue.

CONCLUSION

Appellant respectfully requests that the South Carolina Supreme Court look favorably upon its Petition and issue a Writ of Certiorari to the Court of Appeals in this case.

Date: December 8th, 2022

Respectfully,



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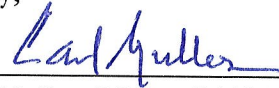
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CERTIFICATE OF COUNSEL

I, the undersigned counsel for Petitioner, hereby certify that a Petition for Rehearing was made and finally ruled on by the Court of Appeals. The Petition was filed on August 2, 2022. It was finally ruled on by the Court of Appeals on November 15, 2022.

Date: December 8th, 2022

Respectfully,



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Exhibit A

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP0702629

Official File Stamp: 04-11-2022 01:15:27 PM

Court: CIRCUIT COURT

Common Pleas

Beaufort

Case Caption: Margaret A Eberly , plaintiff, et al VS Advanced Flooring & Design Division Of Isi Llc , defendant, et al

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals

- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits

Filed by or on behalf of: Jason Michael Imhoff

This notice was automatically generated by the Court's auto-notification system.

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The following people were served electronically:

- Megan Christine White for Huttons Landscapes Inc
- Thomas Elihue Dudley, III for D R Horton Inc
- Scott Harris Winograd for Lather Construction Inc, Lather Construction Sc Inc
- Jason Michael Imhoff for D R Horton Inc
- Stacey Patterson Canaday for Valim Construction Llc
- Clarke W. DuBose for Professional Drywall & Paint Services Llc
- John T. Crawford, Jr. for D R Horton Inc
- Michael Lawrence Leech for East Coast Construction Cleanup Corp.

Brent Morris Boyd for Professional Drywall & Paint Services Llc

Benjamin Alexander Crute Traywick for Margaret A Eberly et al

Francis Heyward Grimball for Archer Exteriors Inc

James H. Elliott, Jr. for Archer Exteriors Inc

Alexandra Scott Williams for Margaret A Eberly et al

Emily Gifford Lucey for Huttons Landscapes Inc

Philip Paul Cristaldi, III for Lather Construction Inc, Lather Construction Sc Inc

Jeffrey A Ross for Lather Construction Inc, Lather Construction Sc Inc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Certificate of Electronic Notification

- Recipients**
- James Elliott - Notification transmitted on 04-11-2022 01:15:43 PM.
 - Benjamin Traywick - Notification transmitted on 04-11-2022 01:15:45 PM.
 - Thomas Dudley - Notification transmitted on 04-11-2022 01:15:46 PM.
 - Stacey Canaday - Notification transmitted on 04-11-2022 01:15:44 PM.
 - Emily Lucey - Notification transmitted on 04-11-2022 01:15:44 PM.
 - Clarke DuBose - Notification transmitted on 04-11-2022 01:15:44 PM.
 - Megan White - Notification transmitted on 04-11-2022 01:15:46 PM.
 - Scott Winograd - Notification transmitted on 04-11-2022 01:15:46 PM.
 - Alexandra Williams - Notification transmitted on 04-11-2022 01:15:45 PM.
 - Brent Boyd - Notification transmitted on 04-11-2022 01:15:42 PM.
 - Jeffrey Ross - Notification transmitted on 04-11-2022 01:15:45 PM.
 - Philip Cristaldi - Notification transmitted on 04-11-2022 01:15:44 PM.
 - Francis Grimbball - Notification transmitted on 04-11-2022 01:15:46 PM.
 - John Crawford - Notification transmitted on 04-11-2022 01:15:43 PM.
 - Jason Imhoff - Notification transmitted on 04-11-2022 01:15:43 PM.
 - Michael Leech - Notification transmitted on 04-11-2022 01:15:45 PM.

Subject: Received Notice: Your filing, Re: 2019CP0702629 - (100) Constructions - Appeal/Notice of Appeal to Court of Appeals, was received

efiledonotreply@sccourts.org <efiledonotreply@sccourts.org>
to Jason Imhoff, Stephanie Simpson

Mon, Apr

You are viewing an attached message. Carl Muller Attorney at Law Mail can't verify the authenticity of attached messages.

To: Jason Michael Imhoff lmhoff@conlaw.com
From: efiledonotreply@sccourts.org
Date: 2022-04-11 13:15:27.133
Subject: Your electronic filing, Re: 2019CP0702629 - (100) Constructions - Appeal/Notice of Appeal to Appeals, was received by CIRCUIT COURT.

Case Number: 2019CP0702629
Case Type: (100) Constructions
Document Type: Appeal/Notice of Appeal to Court of Appeals
Document Type: Exhibit/Filing of Exhibits
Document Type: Exhibit/Filing of Exhibits

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Hon. Bentley D. Price

---

CASE NO. 2019-CP-07-02629

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Margaret A. Eberly and Barbara J. Pavelik.....Respondent,

v.

Advanced Flooring & Design Division of ISI, LLC;  
Archer Exteriors, Inc.; Crossroads Enterprises, LLC;  
D.R. Horton, Inc.; East Coast Construction Cleanup Corp.;  
Hutton's Landscapes, Inc.; Lather Construction SC, Inc.;  
Lather Construction, Inc.; Professional Drywall & Paint Services, LLC;  
Professional Exteriors II, LLC; and Valim Construction, LLC.....Defendants

Of Whom

D.R. Horton, Inc.....Appellant.

---

**NOTICE OF APPEAL**

---

D.R. Horton, Inc. appeals the Order of the Honorable Bentley D. Price granting the Motions for Summary Judgment of Lather Construction and Hutton's Landscapes, Inc filed on March 11, 2022 as well as the Order Denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Judgment of the Honorable Bentley D. Price dated and filed March 24, 2022. Counsel for the Respondent received written notice of entry of the Order Denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Judgment on March 24, 2022.

s/ Jason M. Imhoff

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Apr 28 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Hon. Bentley D. Price

CASE NO. 2019-CP-07-02629

Margaret A. Eberly and Barbara J. Payelik.....Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC;  
Archer Exteriors, Inc.; Crossroads Enterprises, LLC;  
D.R. Horton, Inc.; East Coast Construction Cleanup Corp.;  
Hutton's Landscapes, Inc.; Lather Construction SC, Inc.;  
Lather Construction, Inc.; Professional Drywall & Paint Services, LLC;  
Professional Exteriors II, LLC; and Valim Construction, LLC.....Defendants

Of Whom

D.R. Horton, Inc.....Appellant

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; and  
Lather Construction, Inc.;.....Respondents.

**AMENDED NOTICE OF APPEAL**

D.R. Horton, Inc. appeals the Order of the Honorable Bentley D. Price granting the Motions for Summary Judgment of Lather Construction and Hutton's Landscapes, Inc filed on March 11, 2022, as well as the Order Denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Judgment of the Honorable Bentley D. Price dated and filed March 24, 2022. Counsel for the Respondent received written notice of entry of the Order Denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Judgment on March 24, 2022.

s/ Jason M. Imhoff

---

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SC, Inc.*

Margaret A Eberly et al  
PLAINTIFF(S)

Lather Construction Inc et al  
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

This matter came before the Court as Defendant Hutton's Landscapes, Inc.'s Motion for Summary Judgment on the Cross-Claims of D.R. Horton and Defendant Lather Construction, Inc.'s Joinder in Hutton's Motion for Summary Judgment.

Defendant Hutton's Landscapes, Inc.'s Motion for Summary Judgment on the Cross-Claims of D.R. Horton and Defendant Lather Construction, Inc.'s Joinder in Hutton's Motion for Summary Judgment are granted.

ORDER INFORMATION

This order  ends  does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/11/2022 .

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APR 13 2022

SC Court of Appeals

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Beaufort Common Pleas

**Case Caption:** Margaret A Eberly , plaintiff, et al VS Advanced Flooring & Design  
Division Of Isi Llc , defendant, et al  
**Case Number:** 2019CP0702629  
**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2022-03-11 12:23:59 page 3 of 3

ELECTRONICALLY FILED - 2022 Mar 11 3:10 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0702629

24

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**Dec 08 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Hon. Bentley D. Price, Circuit Court Judge

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Margaret A. Eberly and Barbara J. Pavelik,  
Plaintiffs

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Advanced Flooring & Design Division of ISI, LLC; Archer Exteriors, Inc.; Crossroads Enterprises, LLC; D.R. Horton, Inc.; East Coast Construction Cleanup Corp.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; and Valim Construction, LLC.,

Defendants of which D. R. Horton, Inc. is Appellant,

And

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Cross-claimant and Appellant,

v.

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.,  
Cross-defendants and Respondents

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**PROOF OF SERVICE**

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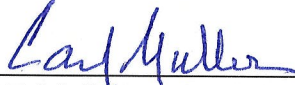
I certify that I have served Appellant's Petition for a Writ of Certiorari upon all counsel of record as follows:

By depositing a copy of it via Electronic Mail and in the U.S. Mail, postage prepaid, on December 20, 2022, addressed to:

Emily Gifford Lucey, (S.C. Bar# 72785)  
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Attorneys for Respondent Lather  
Construction, Inc., and  
Lather Construction SC, Inc.

A copy of the sent email will be filed with this Proof of Service.

  
\_\_\_\_\_  
s/Carl F. Muller, Esq., SC Bar No. 4131  
Carl F. Muller, Attorney at Law, P.A.  
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Attorney for Petitioners



Kay Kelly &lt;kay@carlmullerlaw.com&gt;

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**PETITION FOR WRIT OF CERTIORARI /APPELLATE CASE NO. 2022-000469 Case No. 2019-CP-07-02629**

1 message

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**Kay Kelly** <kay@carlmullerlaw.com>

Thu, Dec 8, 2022 at 2:57 PM

To: egiffordlucey@richardsonplowden.com, "mwhite@richardsonplowden.com" <MWhite@richardsonplowden.com>, jross@rclawsc.com, pcristaldi@rclawsc.com, Scott Winograd <swinograd@rclawsc.com>  
Cc: imhoff@conlaw.com, John Crawford <crawford@conlaw.com>, dudley@conlaw.com  
Bcc: Carl Muller <carl@carlmullerlaw.com>

Dear Counsel,

Please find attached the Petition For Writ Of Certiorari and Proof of Service being filed with the Court of Appeals and the Supreme Court of South Carolina today via electronic service and by the United States 1st class mail on Monday, December 12, 2022, in the above case.

Please let me know if you need anything further or have any questions.

Thank you,  
Kay Kelly

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**D. Kay Kelly**[kay@carlmullerlaw.com](mailto:kay@carlmullerlaw.com)

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 **Petition For Writ Of Certiorari.pdf**  
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